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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re C.E.¹ et al., Persons Coming
Under the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

J.M. et al.,

Defendants and Appellants.

C070254

(Super. Ct. Nos.
JD231537, JD231538)

The parents of two minors appeal from the juvenile court's orders terminating their parental rights and freeing the minors for adoption. (Welf. & Inst. Code, §§ 366.26, 395.)² They

¹ In its orders terminating parental rights and freeing the minors for adoption, the juvenile court ordered that the case files and court records be amended to reflect the minors' names as C.E. and P.E.

² Undesignated statutory references are to the Welfare and Institutions Code.

contend their parental rights were terminated without the requisite finding -- by clear and convincing evidence -- of parental unfitness.³ Father further contends that the failure to apply the constitutionally required burden of proof was not harmless because the record shows that his interactions with the minors may have been nonsexual demonstrations of affection, rather than sexual abuse. We conclude that parents' claim of error is meritless and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After both parents were arrested and charged with various child sexual molestation and pornography offenses, section 300 petitions were filed on behalf of the minors, C.E. (male, age 10 months) and P.E. (female, age three years nine months). The petitions alleged father had sexually abused both minors and mother had taken photographs of father's sexual acts with C.E. and had failed to protect the minors.

The allegations regarding C.E. stemmed from photographs that were intercepted in mail mother sent to the maternal uncle,

³ In his notice of appeal, father indicated his intent to also challenge findings and orders made by the juvenile court related to the section 387 petitions filed by the Sacramento County Department of Health and Human Services and the minors' placement in nonrelative foster care. In her notice of appeal, mother indicated only an intent to challenge the order terminating parental rights. While father provides factual background concerning the section 387 petitions in his opening brief, he makes no claim of error. Accordingly, we deem the appeal on that ground abandoned and dismiss the appeal from the section 387 orders. (*In re Sade C.* (1996) 13 Cal.4th 952, 994-995.)

who was incarcerated in state prison, and photos found at the family home. Two of the photos sent to the maternal uncle depicted C.E. naked, with father putting his mouth over C.E.'s anus and genital area and touching his anus. Of the photos later found at the family home, two depicted C.E. lying naked and father touching C.E.'s genitals. Four photos depicted father with his face between C.E.'s legs; one of those photos showed the father's mouth covering C.E.'s genitals and anal area. Some of the photos found at the home were duplicative of the photos sent to the maternal uncle.

Mother admitted to police investigators that she took the photos and mailed them to her brother in prison. She said father was only playing with C.E. and denied that father ever kissed C.E.'s private parts. Father told police investigators that he tickled C.E.'s legs with his goatee and said the only time he touched the minors' private parts was when he was changing their diapers.

Later, father told a social worker that he did kiss C.E.'s "huevitos" (little eggs/balls) and saw nothing wrong with it. He stated it was innocent and he had no bad intentions. It was tradition. Mother told the social worker that it is a custom in El Salvador for a father to "kiss their little boy's parts when they are born."

During a medical examination, P.E. told the doctor that she had seen father orally copulate C.E. P.E. told her foster mother that she played the "making love game with daddy." When asked about the game, she replied, "We're ladies, we don't talk

about it." She said mother also played the game sometimes. P.E. also said father used to "eat her bread every day." The foster mother said P.E. referred to her genital area as "bread." P.E. asked the foster mother not to say anything, because father had told her the police would take him away. During a later forensic interview, P.E. said that father tickled her mouth with his "picquito" (little beak) and identified a penis on an anatomical drawing as a "picquito."

Father is a sex offender registrant. He was convicted in Oregon in 1995 of second degree sexual abuse, the victim purportedly being his girlfriend at that time.

A combined jurisdiction and disposition hearing was held on August 25, 2011. As to jurisdiction, the juvenile court sustained the allegations of the petition, finding by a preponderance of the evidence that father orally copulated C.E. and P.E. and that he had P.E. orally copulate him. As to disposition, the juvenile court adjudged the minors dependent children and found, *"by clear and convincing evidence" that "[t]here is a substantial danger to the [minors'], physical health/safety, protection or emotional well-being or would be if the [minors] were returned home and there are no reasonable means by which the [minors'] well-being can be protected without removing the [minors] from the parents."*

The juvenile court denied reunification services to both parents pursuant to section 361.5, subdivision (b) (6), and set a section 366.26 permanency planning hearing. Neither parent filed a writ petition or appeal from the judgment of

disposition. The section 366.26 hearing was held on January 24, 2012, and the juvenile court terminated parental rights. Parents now appeal.

DISCUSSION

Father contends that the juvenile court's order terminating parental rights was not based on the constitutionally required standard of clear and convincing evidence and that the evidence does not rise to that level of proof. Mother joins, additionally asserting that "unfitness" was not established by clear and convincing evidence. Although California's dependency scheme no longer uses the term "parental unfitness," it does require the juvenile court to make a finding that awarding custody of a dependent child to a parent would be detrimental to the child. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1211, citing *In re Dakota H.* (2005) 132 Cal.App.4th 212, 224, fn. 3; accord, *In re Frank R.* (2011) 192 Cal.App.4th 532, 537-538.) Due process requires that the finding of detriment be made by clear and convincing evidence before terminating a parent's parental rights. (*In re Frank R., supra*, 192 Cal.App.4th at pp. 537-539.)

Parents' contention that the court failed to apply the proper standard is belied by the record. The juvenile court expressly stated it made the requisite finding by clear and

convincing evidence.⁴ Thus, parents' due process rights were not violated.

Parents nonetheless argue the finding was insufficient to meet the due process requirements because it was based on the jurisdictional findings, which were supported and made by a preponderance of the evidence. However, any such challenge of the validity of the juvenile court's detriment finding should have been made at the time the finding was made. Parents cannot challenge the foundation or evidence supporting the juvenile court's findings made at the disposition hearing in this appeal. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018; *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1396.) Even so, it is clear the juvenile court determined that the evidence before it not only satisfied the preponderance of the evidence standard, but more than that, it also established detriment by clear and convincing evidence. That evidence included the photographs, the video recording of P.E.'s forensic interview, and the inconsistencies between the statements parents made to law enforcement and to the social worker.⁵

⁴ We note that on January 24, 2012, the juvenile court also made the detriment finding in connection with supplemental section 387 petitions seeking to remove the minors from the home of the maternal aunt and uncle.

⁵ Focusing solely on the abuse of C.E. and ignoring the abuse of P.E., father contends that the court's application of the preponderance of the evidence standard was not harmless because the evidence suggested his interactions with C.E. may have been nonsexual, culturally appropriate demonstrations of affection.

DISPOSITION

The juvenile court's orders are affirmed.

MURRAY, J.

We concur:

BUTZ, Acting P. J.

DUARTE, J.

Since there was no error in applying the appropriate standard of proof, we need not address father's harmless error arguments.